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No. 09-1071

Supreme Court, U.S.
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In The

Supreme Court of the United States

GO DADDY SOFTWARE, INC.,

Petitioner,

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the Petition for a Writ of Certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

Respondent's opposition to Go Daddy's Petition for Writ of Certiorari goes to great lengths to neither defend nor adopt the rationale of the two-to-one Ninth Circuit opinion below. Instead, Respondent advances a new, but still flawed theory that the court of appeals neither considered, nor decided. Respondent then argues that the court of appeals was not permitted to review the trial court decision even under the plain error standard – despite clear precedent to the contrary. Respondent's extraordinary effort to distance itself from the court of appeals decision is not surprising given Judge Noonan's description of the jury verdict as a "miscarriage of justice," and his observation that the panel majority "flout[ed]" three well-established decisions by this Court, including the Court's *per curiam* opinion in *Clark County School Dist. v. Breeden*, 532 U.S. 268 (2001); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Respondent's eleventh hour "non-defense" of the ruling below, stands as further support for why review by this Court is necessary.

The panel majority held that Mr. Bouamama's complaint to his employer's personnel department amounted to "protected activity" under Title VII because it was reasonable for him to believe that the Company was discriminating against him. [APP.26.] To reach this conclusion, the court of appeals relied exclusively on the "totality of circumstances" test in *Breeden*, in which this Court held that "'offhand

comments, and isolated incidents (unless extremely serious)' do not amount to discrimination." [APP.25 (quoting *Breeden* at 271).] Specifically, the court of appeals reasoned that the conduct to which Mr. Bouamama had been subjected at Go Daddy "went beyond mere 'offhand comments' and 'isolated incidents,'" [APP.27 (quoting *Breeden* at 271),] and "therefore" that "two, and possibly three, complaints" to his employer met the *Breeden* standard of protected activity. [*Id.*] The court of appeals cited no other standard to reach this conclusion. Applying the same standard, yet coming to the opposite conclusion, Judge Noonan's analysis also focused exclusively on whether the "totality of the circumstances" standard in *Breeden* had been met. [APP.38-39.]

Despite both the majority and the dissent's exclusive application of *Breeden* to the facts in this case, Respondent now argues that *Breeden* is "inapposite." [Opp. at 19.] According to Respondent, the *Breeden* standard need not be met because the *singular* complaint at issue in this case was *not* about Mr. Bouamama's "work environment," but rather about "another kind of unlawful employment practice." [*Id.*] That theory, however, was neither decided nor explicitly considered by the court of appeal, and therefore is not subject to review by this Court. The issue in this case is whether Judge Noonan was correct in concluding that the panel majority's application of the *Breeden* standard flouts this Court's well-established precedent that a complaint about "offhand comments and isolated incidents" is not protected activity for

purposes of Title VII's anti-retaliation provision. [APP.33, 36-37.]

Even assuming, arguendo, that Respondent's new theory of the issue before the Court is properly presented for review, the legal flaw in the jury's verdict is the same and Go Daddy's Petition for Certiorari should be granted: Mr. Bouamama's complaint could not have been a reasonable one under this Court's precedent, regardless of whether he was complaining about the elimination of his job, or about a hostile work environment, because the manager who decided to eliminate his position did so **before** he allegedly asked Mr. Bouamama **any** questions regarding his national origin, or his religion. [GD ER106.] In other words, no reasonable person could believe that he was selected for job elimination because of his religion or national origin if the alleged discriminator did not even ask questions about those topics until **after** the decision. [*Id.*] Thus, based on the sequence of the decision and the questions ***alone***, Mr. Bouamama's complaint that the decision was based on unlawful considerations of his national origin and religion was objectively unreasonable. Therefore, Respondent's new theory cannot, as a matter of law, constitute protected activity under this Court's well-established precedent construing Title VII.

Secondly, apparently concerned about the vulnerability of the court of appeals' analysis under *Breeden*, Respondent commits most of its argument in opposition to its claim that the court of appeals erred

by granting *any* appellate review to the jury's verdict – even under the extremely deferential plain error standard. Respondent further argues that such a case is both inappropriate for review by this Court and constitutes a threat to the Seventh Amendment of the Constitution. Respondent provides no support for these hyperbolic and novel theories; indeed, at least two cases reviewed by this Court were decided on a plain error standard by the appellate courts below.

This Court has repeatedly rejected the theory that Title VII operates as a "general civility code" for the American workplace. Given the Ninth Circuit's insistence on applying a pre-*Breeden* standard against the instruction of this Court, and the importance of this issue to the American workplace – particularly given the recent rise of retaliation claims, an authoritative resolution of the question by this Court is required to ensure that Title VII law in the Ninth Circuit remains aligned with this Court and with that of other Circuits.

I. The Undisputed Sequence of Events Cannot, as a Matter of Fact or Law, Support Mr. Bouamama's Reasonable Belief that a Title VII Violation Occurred Under the Standard in *Breeden* or Otherwise

There is no dispute that the questions Mr. Bouamama's new manager Craig Franklin allegedly asked him about his religion and national origin were asked of Mr. Bouamama on April 7, 2003, three days **after**

Mr. Franklin, Mr. Villeneuve, and Heather Slezak, Go Daddy's director of personnel, had already met with Mr. Bouamama to inform him that his position had been eliminated.[1] Yet, Respondent now relies exclusively on Mr. Franklin's questions on that day to argue that "the evidence showed that Bouamama reasonably believed, based **principally** on Franklin's comments about Bouamama's religion and national origin, that Franklin was **eliminating** Bouamama's Inbound Sales Manager job **because of** Bouamama's religion or national origin." [Opp. at 14 (emphasis added).] This argument must fail as a matter of law and logic because – as Mr. Bouamama's testimony proves – Mr. Franklin had not even asked Mr. Bouamama about his religion or national origin, until **after** he decided to eliminate his position. Moreover, Respondent omits the exchange between Respondent and Mr. Bouamama immediately following the above testimony:

> Q: So you told – you told her this was the second time that somebody had complained – had **made comments** about you?
>
> A: That was, I would say, the second or third time that I spoke to her about some matters like that.

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[1] That Go Daddy eliminated Mr. Bouamama's Inbound Sales Manager position on April 4, 2003, three days before he engaged in protected activity, was thrice confirmed by the District Court. *See* [APP.54, 55, 57.]

> Q: So you had gone to Miss Slezak to complain about **comments about your national origin and religion** before?
>
> A: That's correct. [ER108.]

Mr. Bouamama's testimony makes clear that his alleged complaint to Ms. Slezak on April 7 was not because of the elimination of his position, but because someone had "made comments" about his "national origin and religion." [*Id.*]

Mr. Bouamama testified that Mr. Franklin **first** told him he wanted to eliminate his position and "**the next day**" took an interest in "who he was" and "where he was from." [EEOC SER64.] Under Respondent's theory, how could Mr. Bouamama have reasonably believed that the decision to eliminate his position was made for unlawful reasons when those reasons were as yet **unknown** to Mr. Franklin, the undisputed decisionmaker? Based on the timing of the decision and the alleged conversation alone, Respondent's argument that Mr. Bouamama's complaint to Ms. Slezak on April 7 constituted "protected activity" must fail.

No doubt the panel majority agreed that the timing of Mr. Franklin's questions was insufficient by itself to support a reasonable belief by Mr. Bouamama that Mr. Franklin harbored animus against him at the time he decided to eliminate his position. If the court had relied on Respondent's view that Mr. Franklin's comment alone was sufficient, the court would have had no reason to apply *Breeden*, or to look

beyond Mr. Franklin's questions, to "all the circumstances," including comments made by Mr. Villeneuve over a year earlier.[2]

Rather than rely on Mr. Franklin's April 7th questions alone, as Respondent now suggests, the court of appeals focused on the "totality of the circumstances" and reasoned that "if a person has been subjected to more than one comment, and if those comments, taken together, would be considered by a reasonable person to violate Title VII, that person need not complain specifically about all of the comments to which he or she has been subjected . . . We do not read *Breeden* to require more." [APP.27.]

It is telling that Respondent made no effort to defend this aspect of the panel majority's analysis.

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[2] In December 2001 or early 2002, Mr. Villeneuve overheard Mr. Bouamama talking with a caller in French and asked him what languages he spoke. [APP.34-35.] When he answered, "French and Arabic," Mr. Villeneuve allegedly asked where Mr. Bouamama was from and what religion he practiced. [APP.35.] Mr. Bouamama testified that six months later he told Ms. Slezak about Villeneuve's questions – in the meantime, Mr. Villeneuve (who had also hired Mr. Bouamama) had given Mr. Bouamama a promotion and a big increase in salary). [APP.35.] Mr. Bouamama also testified that sometime after September 11, 2001, he overheard Mr. Villeneuve talking to other employees and saying, "The Muslims need to die. The bastard Muslims need to die." [APP.5; EEOC SER58.] Mr. Bouamama was not the addressee of the comment and did not report it. Indeed, at trial, in light of the events of September 11, he admitted that he could "understand" the anger people had expressed after the 9/11 terrorist attacks and **never complained** about the comment. [APP.6.]

As this Court has consistently held, there is no question that *Breeden* requires much more than the evidence reflected in the record here. Indeed, subsequent cases in other Circuits, and prior decisions by this Court, have emphasized that, "[Title VII] prohibits ***severe or pervasive*** harassment; it does not mandate a happy workplace." *Jensen v. Potter*, 435 F.3d 444, 451 (3d Cir. 2006) (emphasis added) (citing *Faragher*, 524 U.S. at 788; *Harris*, 510 U.S. at 21).

II. This Court Should Decline to Consider Respondent's Newly Raised Argument that *Breeden* Does Not Apply

Apparently concerned that the court of appeals erred in its analysis, Respondent has abandoned its argument that Mr. Bouamama's complaint "satisfied the requirements in *Breeden*" [EEOC Brief at 37] and now argues that analyzing this case under Breeden is not "sensible," [Opp. at 19,] urging this Court to affirm the decision below despite Respondent's view that *Breeden* does not provide the "proper analysis" to the facts at issue here. [*Id.* at 20.] Yet, the Commission argued to the court of appeals below that Mr. Bouamama's complaint "satisfied the requirements of *Breeden*." [EEOC Brief at 37.]

This Court has consistently confined itself to review of arguments both presented to and ruled on by the lower courts. *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (declining to consider issues neither raised before nor considered by the Court of

Appeals) (citations omitted). There can be no dispute that both the majority and the dissent focused their entire analysis on whether the "totality of the circumstances" standard in *Breeden* was met. [APP.24-27; 34-40.] Indeed, Respondent admits that the court of appeals opinion focused on the "surrounding context." [Opp. at 11.] The totality-of-circumstances examination is viewed as the "most basic tenet of the hostile-work-environment cause of action." *Williams v. General Motors Corp.*, 187 F.3d 553, 563 (6th Cir. 1999). It is puzzling why the court of appeals would apply this well-known hostile work environment standard if, as Respondent contends, Mr. Bouamama was not complaining about his work environment on April 7, but was instead complaining that the elimination of his job was based on unlawful discrimination.

In an effort to shoe-horn the court of appeals decision into Respondent's new theory of the case, Respondent argues that "[a]lthough the court of appeals did not expressly treat Bouamama's complaints as categorically different from *Breeden*-like complaints of a hostile work environment, its analysis is quite consistent with that approach." [Opp. at 19 n.5.] Respondent's new approach is wholly inconsistent and irrelevant to the analysis applied by both the majority and the dissent as to whether Mr. Bouamama was reasonable in his belief that he was reporting a pattern of discrimination on April 7 under the standard set forth in *Breeden*.

Like the majority, Judge Noonan's dissent also focused exclusively on whether the *Breeden* standard had been met, but rejected the majority's view that Mr. Bouamama was reporting a pattern of discrimination on April 7. Instead, Judge Noonan emphatically concluded that "[n]o rational person could have thought that the two conversations with two different men in different contexts and at widely separated times constituted a pattern of discriminatory conduct by Go Daddy. Even the jury did not think they did, returning an answer of 'No' to the question asking if Go Daddy had discriminated. . . . Bouamama did not report a pattern. At most he reported a single sentence that he deemed discriminatory." [APP.32-33.] As Judge Noonan aptly notes, the jury rejected three of four of the Commission's claims against Go Daddy, including both discrimination claims, and Respondent's claim that Go Daddy failed to promote Mr. Bouamama to the position of Sales Supervisor in retaliation for engaging in protected activities.[3] Therefore, "[i]f Bouamama did not report discrimination, what did Go Daddy retaliate against?" [*Id.* at 33.]

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[3] The jury returned a verdict in favor of Respondent on its retaliatory discharge claim, based on Mr. Bouamama's termination, not based on Go Daddy's failure to permit Bouamama to return to the Sales Representative position, as Respondent claims. [GD ER48-49.]

III. The Ninth Circuit's Plain Error Review Was Proper

The Ninth Circuit was well within its authority to review the trial court's denial of Go Daddy's 50(b) motion for plain error. Indeed, this Court has repeatedly recognized that "the matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases . . . [for] [c]ertainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt . . . or where 'injustice might otherwise result.'" *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

As Judge Noonan noted in his dissent: "Jury verdicts deserve all the deference that the law wisely accords them. But appellate courts, too, have a function in reviewing what the jury did." [APP.40.] Go Daddy made a reasonably narrow 50(a) motion; however, even if no motion had been made, it is well-established that where a party entirely fails to file a Rule 50(a) motion, it is entitled to a review of the issues raised in its Rule 50(b) motion "where there is such plain error apparent on the face of the record that failure to review 'would result in a manifest

miscarriage of justice.'"[4] *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1109 (9th Cir. 2001).

Undoubtedly concerned that the Ninth Circuit erred in its *Breeden* analysis, Respondent spends much of the opposition arguing that this case is an unworthy vehicle for this Court's review based on the standard of review applied by the court of appeals. However, Respondent cites no authority for its claim that "the plain error posture makes this an unattractive vehicle for this Court's review." [Opp. at 24.] Indeed, this Court has often granted certiorari where the court of appeals applied the plain error standard of review below. *See, e.g., McNeil v. United States*, 508 U.S. 106 (1993) (Seventh Circuit reviewed for plain error and this Court granted petition for certiorari); *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995) (Second Circuit reviewed for plain error and this Court granted petition for certiorari).

Likewise, Respondent fails to cite any authority for its bald claim that the Seventh Amendment precludes appellate reexamination of the verdict in this case. [*See* Opp. at 21.] In both cases cited by

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[4] Go Daddy did not waive its argument that the Commission presented insufficient evidence in support of its retaliation claim. While the district court found Go Daddy had waived certain arguments, that finding was based on an overly strict interpretation of Rule 50(a)(2). *See, e.g., Kusens v. Pascal Co.*, 448 F.3d 349, 361 (6th Cir. 2006) (stating a Rule 50(a) motion should not be reviewed narrowly); *Federal Sav. & Loan Ins. Corp. v. Reeves*, 816 F.2d 130, 138 (4th Cir. 1987) (stating rigid application of the rule is inappropriate).

Respondent, the appellate court improperly entered a directed verdict for a party that did not move for judgment notwithstanding the verdict under Rule 50(b), rather than granting a new trial. [Opp. at 25.] The propriety of Petitioner's 50(b) motion is not disputed and thus the cases cited to the contrary are inapposite. Further, Respondent relies on a footnote in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006), to support the contention that this Court has categorically stated that plain-error review violates the Seventh Amendment. [Opp. at 25.] In fact, whether plain-error review violates the Seventh Amendment was not an issue in controversy in *Unitherm*. Footnote 4 of *Unitherm* only noted that a proposed approach to Rule 50(b) motions by the dissenting Justices could present Seventh Amendment "issues." [*Id.*] Accordingly, it is inaccurate to contend this Court "recognizes that a plain error approach could raise serious Seventh Amendment concerns" with respect to review absent a proper Rule 50(a) motion. [*See id.*]

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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